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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a private corporation organized as a "non-profit, voluntary, membership organization," having assumed through its standard-setting activities "great economic influence" over an entire industry, is subject to antitrust liability for the acts of its employees and other agents under the same legal standard that applies to other corporations or under some lesser rule.

2. Whether such a private corporation is subject to antitrust liability for the acts of its employees and other agents where such acts are ratified by corporate officers after disclosure of all material facts.

3. Whether the evidence below was sufficient to support the jury's verdict that the petitioner, through its employees and agents, participated in a conspiracy to restrain trade and to monopolize *either* under the legal standard with which the District Court charged the jury (which was proposed by the petitioner and which the petitioner told the Court of Appeals was "generally accurate") *or* under the even less favorable standard enunciated by the Court of Appeals.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent Hydrolevel Corporation ("Hydrolevel") opposes the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit filed by The American Society of Mechanical Engineers, Inc. ("ASME"). Hydrolevel contends that the Opinion of the Court of Appeals below, contained in the Appendix to the Petition, is a correct decision which raises no considerations described in Rule 17 of this Court and which, in fact, raises no issue properly reviewable by a writ of certiorari.

COUNTERSTATEMENT OF THE CASE

Consistent with its narrow view of the record below, the ASME has presented in its Petition a limited selection of the "facts" while at the same time taking liberties with the facts presented. In order to more accurately reflect the evidence as submitted to the jury, a short statement of clarification is in order. Hydrolevel has filed its own Petition for a Writ of Certiorari to review another aspect of the decision of the Court of Appeals, No. 80-1771, and hereby incorporates by reference the statement of the case made therein.

First and foremost, Messrs. Hardin* and James,** the ASME members principally involved in the issuance of the April 29, 1971 interpretative letter, were, at all times, specifically authorized by the ASME to engage in activities associated with interpretation of the ASME's Boiler and Pressure Vessel Code (the "B-PV Code") as it pertained to the boiler controls

* T. R. Hardin was a Vice President of Hartford Steam Boiler Inspection and Insurance Co. He was also the Chairman of the ASME's Section IV Heating Boiler Subcommittee (the "Subcommittee") which is charged with the responsibility of interpreting the ASME codes as they apply to boiler controls.

** John W. James was a Vice President of McDonnell & Miller Inc. ("M&M/ITT"), a soon-to-be-acquired subsidiary of International Telephone & Telegraph Co. Mr. James was Vice Chairman of the Subcommittee.

manufactured by Hydrolevel, M&M/ITT and others. These individuals drafted the inquiry signed by Mr. Eugene Mitchell, an officer of M&M/ITT, to the ASME dated April 12, 1971, an inquiry which raised significant questions about the acceptability of Hydrolevel's major product under the B-PV Code. These questions were of such a commercial and competitive nature that, under express ASME rules of procedure, it should have been directed to the full Boiler and Pressure Vessel Committee (the "Committee"). Nevertheless, W. Bradford Hoyt, a senior ASME employee, routed the letter to the Chairman of the Subcommittee, Mr. Hardin. Upon receipt of Mr. Hardin's suggested reply, Mr. Hoyt incorporated it verbatim into a letter dated April 29, 1971 over his signature and immediately sent out ASME's response to the April 12, 1971 inquiry.

Following Hydrolevel's discovery of the April 29, 1971 letter in January of 1972, a demand was made upon Mr. Hoyt by Hydrolevel for a full copy of the letter. The ASME stalled, sending a cropped version of the letter which deleted the addressee, M&M/ITT, and left out the paragraph showing who drafted the response. Following another more forceful demand by Hydrolevel, Mr. Hoyt sent a second slightly less redacted version to Hydrolevel but *still* refused to give Hydrolevel the full details.

It was not until May of 1972 that the full Subcommittee, in response to Hydrolevel's continuing complaints, held a meeting to consider the April 29, 1971 letter and Hydrolevel's request that a "correcting statement" be circulated "generally among all who might reasonably have become privy to [the April 29, 1971] letter." Hydrolevel was never given advance notice of this or any other meeting held by the ASME on the subject of the April 29, 1971 letter.

The result of this May 1972 Subcommittee meeting (and of a later full Committee meeting) was a letter to Hydrolevel dated June 9, 1972, which was written by Mr. James and signed by Mr. Hoyt. The first substantive sentence read as follows:

> The Committee confirmed the intent of our letter to the attention of Mr. D. DeLeonardis of February 8, 1972.

The letter of February 8th was the first redacted version of the April 29, 1971 letter which was sent to Hydrolevel. Mr. James' careful drafting thus produced a "correcting statement" which not only confirmed the April 29th letter but was also couched in technical language and made no reference to Hydrolevel or its products.

A draft of the June 9th letter was sent to only one representative of a substantial potential direct purchaser of boiler controls and he received it only because, as one of ninety-two (92) attendees at the May 1972 meetings, he was entitled to receive the fifty (50) page minutes of the meetings to which the draft June 1972 letter was attached as a sixth appendix. ASME made no other efforts to circulate the June 9, 1972 letter.

Hydrolevel was the *only* recipient of the final version of the letter, which did not dispel the continuing doubts of the only two customers who were shown the letter about the acceptability of Hydrolevel controls under the B-PV Code. Despite the obvious importance of this new ASME action, the ASME never informed Hydrolevel that any "appeal" procedure within ASME existed and Hydrolevel had no means of obtaining this information because neither it nor any member of its industry, other than M&M/ITT, had ever had a representative on the full Committee or on the Subcommittee which effectively controlled their livelihood.

In July of 1974, the *Wall Street Journal* printed an article concerning Hydrolevel, the issuance of the April 29, 1971 letter and the June 9, 1972 "correcting statement."* Mr. James, who by this time was the Chairman of the Subcommittee,** reacted by destroying his ASME file. M&M/ITT lawyers reacted by preparing a letter for Mr. James to send to ASME in which he corroborated many of the allegations of the *Journal* article, including the fact that M&M/ITT had been using the original ASME letter with potential Hydrolevel customers.

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* After being tipped off by Mr. Hoyt that the newspaper was investigating, M&M/ITT attempted to prevent publication of the article.

** Mr. James had become Chairman of the Subcommittee after Mr. Hardin's sudden resignation shortly before the May 1972 meetings.

Mr. Paul T. Howse, a Vice President and member of the Board of Directors of ASME, reacted to the *Wall Street Journal* article by writing to the President of the ASME with a request that, if the facts in the article were to be corroborated, a full page apology should be published in the ASME magazine and with the further request that consideration by the Executive Committee of the ASME be given to the Hydrolevel matter.*

No Executive Committee consideration of the Hydrolevel matter took place, no expulsion of Mr. James from the ASME occurred and no apology whatsoever was made by the ASME. Indeed, the "Professional Practice Committee" of the ASME, without even interviewing Mr. James and limiting its inquiry solely to whether Mr. James had "removed himself from the chair" at the May 1972 Subcommittee meeting, exonerated Mr. James and published in the ASME magazine a resolution praising Mr. James' conduct, a resolution cleared for content in advance by Mr. James himself.

In the spring of 1975, Mr. James and another M&M/ITT official testified at hearings being conducted by the Antitrust and Monopoly Subcommittee of the Committee on the Judiciary of the United States Senate concerning the issuance of the April 29, 1971 letter and its distribution throughout the industry. During these hearings Mr. James revealed that he had destroyed his ASME file on the "Hydrolevel affair." These revelations prompted Mr. William A. Shearer, Jr., a member of the Executive Committee of the "Professional Practice Committee" and a member of the ASME Board of Directors, to write to the ASME in April of 1975 taking it to task for not having "ferreted" out the true facts "concerning the problem of John James and his activity on the ASME Boiler and Pressure Vessel Committee." He strongly urged immediate implementation of procedures to avoid "conflicts of interest" and to offset the charge that "codes are self-serving to some of the supporting organizations." The ASME took no action on Mr. Shearer's recommendations and no action has been taken by the ASME

* Mr. Howse also noted that, if the facts recited in the article were true, the ASME had been a party to restricting Hydrolevel's trade and that Mr. James should be expelled from the ASME for "unethical conduct."

against Mr. James, or anyone else, in connection with this matter.

ARGUMENT

The questions presented in the Petition neither possess national importance nor otherwise are appropriate for review by this Court. Moreover, the rulings of the courts below, turning as they did on the particular facts in this case and supported by *several* legal standards of liability, were eminently correct in their conclusions and just in their result.

It is important to consider the significant concessions made in the ASME Petition. The ASME candidly acknowledges that there existed a conspiracy to restrain trade *and to monopolize,* as found by the jury in this case, and that the ASME participated in this conspiracy. More particularly, the ASME concedes that Hydrolevel was the target of this conspiracy and that Hydrolevel suffered competitive injury as a result thereof. In addition to these concessions, the ASME correctly points out that the Court of Appeals totally overlooked and failed to take into consideration the fact that the jury found the ASME liable for a *conspiracy to monopolize* as well as a conspiracy to restrain trade.

In essence, the ASME complains about the imposition of civil liability in a situation where its participation was only of an "unintentional" nature through the malfeasance of its "volunteer" members. From this the ASME constructs a legal argument that has been heard many times from profit-making corporations and which was rejected both by the District Court and by the Court of Appeals.

The fact is that this Court has repeatedly affirmed the general rule that a civil violation of the antitrust laws may be established by proof *either* of an unlawful intent *or* of an anticompetitive effect. *McLain* v. *Real Estate Bd. of New Orleans,* 444 U.S. 232, 243 (1980); *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 436 n.13 (1978). *See Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.,* 604 F.2d 897, 906 n.1 (5th Cir. 1979) (Morgan, J. concurring in

part and dissenting in part) ("Although intent is a necessary element of a criminal antitrust offense, a defendant may incur *civil* liability for an unintentional violation of the antitrust laws.") (Emphasis in original.) Moreover, it is well settled by this Court that the act of one conspirator may be the act of all. *E.g., United States* v. *Kissell,* 218 U.S. 601, 607-08 (1910). These decisions of this Court are dispositive of the ASME's contentions that a disservice has been done to it by the courts below in holding it liable for its "unintentional" participation in the ongoing conspiracy whose ultimate effect was to destroy Hydrolevel.*

In its Petition, the ASME argues at length that the decision of the Court of Appeals is without legal support while at the same time contending that the correct legal standard was that which the ASME proposed to the District Court and *upon which the jury rendered its verdict.* A careful review of the Court of Appeals' decision reveals that its discussion of "apparent authority" was simply not necessary to the decision it reached since the jury's verdict could have been affirmed on two other more liberal standards.** What the Court of Appeals has done is nothing more than to affirm the verdict of the jury while stating that that verdict could stand *either* under the law as enunciated by the District Court *or* under the Court of Appeals' formulation.

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* The evidence presented to the jury strongly supports the jury's verdict that the ASME, through the acts of Mr. Hoyt and through its ratification of the scheme of Messrs. Hardin and James, *did* intentionally and purposefully engage in the conspiracy to restrain trade and to monopolize the market.

** As discussed above, the facts in the record, but omitted from the ASME Petition, strongly support the jury's conclusion that actual authority in fact existed and that the ASME did indeed ratify the acts of its employees and agents. *The ASME has never questioned the correctness of the actual charge of the District Court.* As a matter of fact, the ASME told the Court of Appeals that the charge of the District Court on the subject of "respondeat superior" was "generally correct."

CONCLUSION

The courts below correctly applied the principles established by this Court as to the antitrust liability of a corporation for the acts of its employees and agents. The decision below does not conflict with the decision of any other court of appeals nor does the petition offer any accepted basis upon which it should be granted. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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